**UNITED STATES DEPARTMENT OF TRANSPORTATION**
**OFFICE OF HEARINGS**
**WASHINGTON, D.C.**

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**IN THE MATTER OF**

**TRANSLAND, INC.**
**BRIAN WILLSON**
**CHARLES ROBERTS**
**CHRISTOPHER CARTER**
**JAMES DEJONGE**
**MICHAEL SLAUGHTER**
**ALFONSO GONZALES**

DOCKET NOS. FMCSA-2006-25348, 25349
25350, 25351, 25352, 25353, and 25354
(Federal Motor Carrier Safety Administration)

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# FIELD ADMINISTRATOR'S RESPONSE TO TRANSLAND, INC.'S POST-HEARING BRIEF

The Field Administrator for the Federal Motor Carrier Safety Administration ("FMCSA"), Midwestern Service Center, by and through his undersigned attorney, respectfully responds to the post-hearing brief filed by Transland, Inc. ("Transland").

## I. Transland Has Waived Any Argument With Regard To The FMCSA Subpoena, And The Records It Produced In Response To That Subpoena Must Be Deemed To Be MobileMax GPS Records.

The MobileMax GPS records upon which the violations in this matter are based were provided to Safety Investigator Lantz ("SI Lantz") pursuant to a subpoena dated January 4, 2006. (FA Ex. 138). The subpoena directed Transland to produce and permit the copying of "[a]ll Mobile MAX Global Position System records" for a list of drivers. (FA Ex. 138). After having provided records in response to the subpoena, Transland now

argues that the records it provided to SI Lantz were, in fact, not GPS records, and that SI Lantz was mistaken to believe that they were. (Post-Hearing Brief of Transland, Inc., at page 12).

Transland has waived any argument with regard to the FMCSA subpoena, and the records it produced in response to that subpoena must be deemed to be MobileMax GPS records. *See In re Philip C. Corso and Debra J. Corso*, 328 B.R. 375 (E.D.N.Y. 2005). At the time of Transland's compliance with the subpoena, it viewed the documents it provided to be MobileMax GPS records; otherwise, it would have had no reason to produce the documents. If SI Lantz was "mistaken" about the source of the documents he was provided, as Transland now claims, it could only have been because he was deliberately misled by Transland.

## II. The Field Administrator Has Complied With 49 C.F.R. § 386.49.

In an attempt to bolster its argument, Transland misstates 49 C.F.R. § 386.49. Contrary to Transland's argument, 49 C.F.R. § 386.49 does not require written evidence to be attached to an affidavit. Instead, this section provides that "written evidence should be submitted in the following forms: (a) A written statement of a person having personal knowledge of the facts alleged; or (b) Documentary evidence in the form of exhibits attached to a written statement identifying the exhibit and giving its source."

Nowhere in this section does the term "affidavit" appear. Indeed, this section was revised in May 2005, specifically to remove the requirement for affidavit submission with written evidence. 70 Fed. Reg. 28467, 28476 (May 18, 2005) (effective November

14, 2005). Transland's argument is based on an out-of-date reading of the regulations, and should be discounted here.[1]

Moreover, the description of revisions to this section show that the change was intended to ensure that a motor carrier identify the source of documents. In the section-by-section analysis of the May 2005 revisions, FMCSA stated that it "believed it necessary to modify this section to reflect the practical implications of the written evidence ... typically provided by *respondents*." *Id.* (emphasis added). The intent of the revised section was thus to ensure that a motor carrier identify the source of documents that it wanted FMCSA to consider, not to require a witness at a hearing to produce a written statement. "The written statement is less a matter of verification than that of identification and description. With that in mind, it is sufficient for parties to provide a written statement and thus, a requirement of form over substance is not essential to this provision." *Id.*

Here, the evidence that SI Lantz collected and upon which the Field Administrator relied was identified and described at length during the hearing on this matter. SI Lantz testified regarding the source of the exhibits admitted into evidence – he obtained all the

[1] The case cited by Transland, *Arctic Express, Inc. v. United States Department of Transportation*, was decided under the previous regulatory language, not under the language that was in effect at the time of the Compliance Review and Notice of Claim in this matter. 194 F.3d 767, 771 (6th Cir. 1999). Thus, the holding in *Arctic Express* is inapplicable here. Additionally, *Arctic Express* is distinguishable from this matter by the fact that, unlike this matter, there was no administrative hearing held in *Arctic Express*. *Id.* at 768. At the very least, the transcript of the hearing is a written statement that identifies the exhibits and gives their source, which meets the requirements of 49 C.F.R. § 386.49.

documents upon which he relied from a Transland representative. (Tr. 200-201). Moreover, SI Lantz's December 7, 2006 Declaration, in which he describes his investigation and the documents he collected, was admitted into evidence. (FA Ex. 136). The stated purpose of 49 C.F.R. § 385.49 has been met and "a requirement of form over substance is not essential."

## III. The Field Administrator's Exhibits Were Properly Admitted.

Transland also misstates the law governing the admissibility of documentary evidence at administrative hearings. Transland overlooks the reference to the Administrative Procedure Act ("APA") in 49 C.F.R. § 386.56(c), instead choosing to read this section as applying the Federal Rules of Evidence in their entirety without regard to the APA. Transland's reading of 49 C.F.R. § 386.56(c) is wrong; the Federal Rules of Evidence only apply if there is not a governing rule in 49 C.F.R. Part 386 or the APA. *See* 49 C.F.R. § 386.56(c) ("Except as otherwise provided in these rules and the Administrative Procedure Act, ... the Federal Rules of Evidence shall be followed."). The APA contains a rule on the admissibility of documentary evidence, which provides that "[a]ny ... documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence." 5 U.S.C. § 556(d).

In *Woolsey v. National Transportation Safety Board*, the government sought to introduce certain documents into evidence at an administrative hearing after a government investigator testified that he had requested and received the documents from

a commercial pilot's customers during the course of his investigation. 993 F.2d 516, 520 (5th Cir. 1993). The pilot argued that the documents should not have been admitted into evidence because they were not authenticated by a witness with personal knowledge of them, but the Fifth Circuit rejected that argument. *Id.* at 519. The court held that there was no error in the admission of the documents because the documents were requested by the government investigator during an investigation, and the investigator was available at the evidentiary hearing for cross-examination about the method in which the documents were obtained and kept. *Id.* at 520-21. The court further held that, even if the admission of documentary evidence in an administrative hearing was subject to the Federal Rules of Evidence, the documents sought to be introduced by the government still would have been admissible. *Id.*

In this matter, there is an even stronger reason to reject the argument made by Transland. In *Woolsey*, the investigator testified that he obtained the challenged documents from Woolsey's customers. Here, however, SI Lantz testified that he obtained the documents upon which the Field Administrator relied to support the violations directly from a representative of Transland in response to an administrative subpoena. Even if the introduction of these documents involved hearsay, as Transland seems to suggest in its post-hearing brief, "the only limit to the admissibility of hearsay in the administrative context is that it bear satisfactory indicia of reliability." *Id.* at 520 n.11 (internal citations omitted). The source of the MobileMax GPS records here was

Transland itself; for Transland to now argue that the documents it provided in response to an administrative subpoena are inadmissible strains the limits of credibility.

Transland also overlooks 49 C.F.R. § 386.56(d), which reads "[a]ny document, physical exhibit, or other material obtained by the Administration in an investigation under its statutory authority may be disclosed by the Administration during the proceeding and may be offered in evidence by counsel for the Administration." Here, Exhibits 11-128 offered by the Field Administrator were obtained by SI Lantz during an investigation conducted under FMCSA's statutory authority. *See* 49 U.S.C. §§ 502, 504, 506. 49 C.F.R. § 386.56(d) specifically permits the offering of these documents in evidence at a hearing.

## IV. Agency Compliance With Its Internal Procedures Is Not a Proper Issue For This Tribunal.

The critical question to be decided here is whether Transland and the driver Respondents violated the Motor Carrier Safety Regulations. *In re Swift Transportation Co., Inc.*, FMCSA-2001-10674-48 (Order Respecting the Field Operations Training Manual January 12, 2007). As noted in the *Swift* Order, "this case is concerned with the *Respondent's* conduct." (emphasis in original). *Id.*, *citing In re B & J Transportation, Inc.*, FMCSA-2001-10358. The *Swift* tribunal properly refused to entertain matters involving agency compliance with the Field Operations Training Manual ("FOTM"), concentrating instead on "whether the violation or violations alleged occurred, and if so, the appropriate penalty to be assessed." *Swift*, FMCSA-2001-10674-48 at page 2, *citing In re American Airlines, Inc.*, FAA Order No. 89-0006 (December 21, 1989) and *In re*

*Bailey and Gilbert E. Avila*, EA-4294 (NTSB November 18, 1994, 1994 WL 702156); *see also American Farm Lines v. Black Ball Freight Service*, 397 U.S. 532, 538, 90 S.Ct. 1288, 1292 (1970) (agency is entitled to a measure of discretion in administering its own rules in such a manner as it deems necessary). Transland asks this tribunal to ignore evidence of its failure to comply with the FMCSRs based on an allegation that SI Lantz looked at records that Transland would like now to have kept secret. Transland's request should be rejected.

## V. The Field Operations Training Manual Is Not Subject To The Notice-And-Comment Provisions Of The Administrative Procedure Act.

Transland argues that the FMCSA's policy on carrier responsibility for false drivers' logs has not been disclosed as required by the APA because it was not published for notice and comment. In support of this argument, Transland cites *Truckers United for Safety v. Federal Highway Administration*, 139 F.3d 934 (D.C. Cir. 1998).

*Truckers United for Safety*, in direct contradiction to Transland's argument, provides that the FMCSA "has developed and periodically updated regulatory guidance in question-and-answer format to assist parties bound by these regulations." *Id.* at 936.[2] The court there concluded that the challenged regulatory guidance was not subject to notice-and-comment because the "regulations in force both before and after the Administration issued the regulatory guidance provided that motor carriers have a duty to

[2] The Field Administrator notes that the petitioners in *Truckers United for Safety* were represented by counsel for Transland here. *Truckers United for Safety*, 139 F.3d at 935.

require their drivers' compliance with the regulations ... and in particular, with the maximum hours of duty and record keeping regulations...." *Id.* at 939.

Transland makes essentially the same argument here that was rejected by the court of appeals in *Truckers United for Safety* – that the FMCSA's FOTM is somehow subject to the notice-and-comment requirements in the APA. Moreover, Transland ignores *Aulenback, Inc. v. Federal Highway Administration*, 103 F.3d 156 (D.C. Cir. 1997), a case in which Transland's exact argument was considered and explicitly rejected.[3]

In *Aulenback*, petitioners contended that the provisions of the Federal Highway Administration ("FHWA") Motor Carrier Administrative Training Manual[4] should have been subject to the notice-and-comment provisions in the APA. *Id.* at 164. Recognizing "that agencies do not 'develop written guidelines to aid their exercise of discretion only at the peril of having a court transmogrify those guidelines into binding norms,'" *id.* at 169,[5] the court rejected the petitioners' argument, holding that the Motor Carrier Administrative Training Manual was "merely rules of agency procedure and practice, and that the FHWA was, therefore, not required to provide notice and an opportunity for public comment before issuing the Manual to its staff." *Id.* at 168. *See also Commodity Carriers, Inc. v. Federal Motor Carrier Safety Administration*, 434 F.3d 604 (D.C. Cir.

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[3] The Field Administrator notes that the petitioners in *Aulenback* were represented by counsel for Transland here. *Aulenback*, 103 F.3d at 158.

[4] The Motor Carrier Administrative Training Manual is the precursor to the FOTM, and was later superseded by the FOTM.

[5] *Citing Community Nutrition Inst. v. Young*, 818 F.2d 943, 949 (D.C. Cir. 1987)(per curiam).

2001) (requirement that carrier maintain toll receipts for owner-operator employees is not subject to notice-and-comment).

Just as in *Aulenback* and *Truckers United for Safety*, "legislative rules are subject to notice-and-comment requirements, whereas interpretive rules are not." *Truckers United for Safety*, 139 F.3d at 938. The FOTM meets none of the factors necessary to qualify it as a legislative rule.

An interpretive rule may be determined to have legal effect if: (1) in the absence of the rule there would not be an adequate legislative basis for enforcement action or other agency action to confer benefits or ensure the performance of duties; (2) the agency has published the rule in the Code of Federal Regulations; (3) the agency has explicitly invoked its general legislative authority; or (4) the rule effectively amends a prior legislative rule. *Id.* at 938-39, *citing American Mining Congress v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1112 (D.C. Cir. 1993). None of these factors weighs in favor of finding the FOTM to have legal effect, and indeed, the Circuit Court of Appeals for the District of Columbia has already determined that the precursor to the FOTM "simply provided guidance for ... administrators." *Aulenback*, 103 F.3d at 169.

Like the guidance considered in *Truckers United for Safety*, the Field Administrator here "has no apparent need to rely upon [the FOTM] for authority to take any enforcement action." *Truckers United for Safety*, 139 F.3d at 939. The regulations published in the Federal Register and the Code of Federal Regulations, and the regulatory guidance discussed in *Truckers United for Safety*, set forth a carrier's responsibility to

require their drivers' compliance with the regulations. *See* 49 C.F.R. §§ 390.11, 395.8. The FOTM does not authorize or prohibit an enforcement action against a carrier for maintaining false RODS.[6] Absent the FOTM, the Field Administrator would still be entitled to bring an enforcement action against a carrier for maintaining false RODS. 49 C.F.R. § 395.8.

Moreover, just as in *Truckers United for Safety*, the FOTM was not published in the Code of Federal Regulations, the FMCSA has not invoked its legislative authority in creating the FOTM, and the FOTM does not effectively amend a prior legislative rule. *Truckers United for Safety*, 139 F.3d at 938-39. Indeed, the Introduction to the FOTM shows that it "is intended to be a guide" to FMCSA employees, and that the goal "was to present investigative procedures and techniques that can be used while conducting all types of investigations." FA Ex. 130, page 1-2; *see* 74 Fed.Reg. 24897, 24898 (May 26, 2009) (FOTM and eFOTM are internal guidelines intended to provide guidance to enforcement staff, not to impose new substantive burdens). The FMCSA's stated goal was to provide guidance to its own employees, not to make any substantive change to

[6] There is no support in the record for Transland's statement in its post-hearing brief that FMCSA has published in the FOTM methods and standards for a determination of negligence. *See* Post-Hearing Brief of Transland, Inc., page 17.

prior law.[7] *See Aulenback*, 103 F.3d at 168 (if Training Manual does not alter statutory definitions, it is merely rules of agency procedure and practice not subject to notice-and-comment); *see also U.S. v. Fifty-Three (53) Eclectus Parrots*, 685 F.2d 1131, 1136 (9th Cir. 1982) (internal procedures for alerting Customs officers to possible violations of law do not eliminate, narrow, or redefine statutory rights, but merely provide a method by which Customs officers may be informed of information pertinent to their law enforcement duties); *Rank v. Nimmo*, 677 F.2d 692, 698-99 (9th Cir. 1982) (handbooks and circulars do not have force and effect of law); *Schweiker v. Hansen*, 450 U.S. 785, 789, 101 S.Ct. 1468, 1471-72, *reh'g denied*, 451 U.S. 1032, 101 S.Ct. 3023 (1981) (claims manual, as opposed to official regulations, is an internal agency guide and has no legal force).

Transland can point to no instance where any part of the FOTM has amended the regulations or a prior legislative rule. The regulation at issue, 49 C.F.R. § 395.8, does not

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[7] Transland's reliance on *Alaska Professional Hunters Association v. Federal Aviation Administration* is also misplaced. 177 F.3d 1030 (D.C. Cir. 1999). In that case, the Federal Aviation Administration ("FAA") had for 35 years consistently advised Alaskan guide pilots that they were not subject to the regulations applicable to commercial pilots. The FAA then sought to reverse its position by announcement in the Federal Register rather than by way of notice and comment. *Id.* at 1031. There is no evidence in the record in this matter that the FOTM was addressed to the public, that the FMCSA ever advised a motor carrier that it may ignore evidence in its possession that its drivers were violating the regulations, or that the Agency may not review GPS records to determine compliance with the RODS regulation. There is no evidence showing a change in the FMCSA's interpretation of the regulation at issue. Despite Transland's argument to the contrary, they were well aware of the "rules by which the game will be played." *Id.* at 1035. A motor carrier has consistently been required to ensure that its drivers comply with all regulations, including the RODS regulation. *Truckers United for Safety*, 139 F.3d at 939.

address a carrier's responsibility for false logs submitted by its drivers, other than to say that a carrier has a duty to require compliance with the RODS requirements. Although the FMCSA has not published a legislative rule, it has published an interpretive rule that elaborates on a carrier's duty. 62 Fed.Reg. 16370 (April 4, 1997); *Truckers United for Safety*, 139 F.3d at 939.

Regulatory interpretations published by FMCSA to assist motor carriers and others bound by FMCSA's regulations provide guidance on the liability of motor carriers for hours of service violations. 62 Fed.Reg. 16370 (1997). Particularly, in an interpretation of 49 C.F.R. § 395.3, FMCSA provided the following guidance:

> Question 7: What is the liability of a motor carrier for hours of service violations?
>
> Guidance: The carrier is liable for violations of the hours of service regulations **if it had or should have had** the means by which to detect the violations. Liability under the [Federal Motor Carrier Safety Regulations] does not depend on actual knowledge of the violations.
>
> Question 8: Are carriers liable for the actions of their employees even though the carrier contends that it did not require or permit the violations to occur?
>
> Guidance: Yes. Carriers are liable for the actions of their employees. Neither intent to commit, nor actual knowledge of, a violation is a necessary element of that liability. Carriers "permit" violations of the hours of service regulations by their employees of they fail to have in place management systems that effectively prevent such violations.

*Id.* at 16424 (emphasis added).[8]

The evidence presented at the hearing in this matter supports a conclusion that Transland had or should have had the means by which to detect the hours or service violations by its drivers, and thus knew or should have known of those violations.

## VI. Transland Has Chosen The Wrong Forum In Which To Litigate Its Claim That The Field Operations Training Manual Should Be Publicly Available Without Redaction.

The FOTM is available for public inspection and copying pursuant to 5 U.S.C. § 552(a)(2)(C). Transland argues, in essence, that a statute requiring the FMCSA to prescribe safety fitness regulations should somehow be read to eliminate any exceptions provided in the Freedom of Information Act to public disclosure without redaction of the FOTM.

Transland has ignored the jurisdictional requirements in FOIA and has chosen the wrong forum for its request. 5 U.S.C. § 552(a)(4)(B) provides that "the district court of the United States ... has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld." This tribunal has no authority to issue findings on whether the FMCSA has complied with FOIA.

Transland quotes in length from FOIA to support its argument that the FMCSA has a duty to publicly disclose the FOTM without redaction. Transland ignores 5 U.S.C.

[8] Although this guidance is included in the interpretations of 49 C.F.R. § 395.3, by its terms it provides guidance on a carrier's liability for violations of any of the hours of service regulations. *See* Guidance in response to Question 7. 49 C.F.R. § 395.8(e) is included in the hours of service regulations.

§ 552(b), however, which sets forth various types of documents that are not subject to disclosure under FOIA. If Transland were to submit a request under FOIA for the FOTM, that request would be reviewed taking into account all parts of FOIA and a response would be issued. If Transland were to be aggrieved by that response, it could seek redress in the district courts. 5 U.S.C. § 552(a)(4)(B).

Transland relies on *MST Express v. Department of Transportation*, 108 F.3d 401 (D.C. Cir. 1997) to support its argument. In *MST Express*, the court of appeals held that 49 U.S.C. § 31144 required the Department of Transportation to prescribe by regulation a means of determining whether an owner or operator of a commercial motor vehicle satisfies the agency's safety fitness requirements. *Id.* at 402.[9] Subsequently, the Department promulgated regulations, which were unsuccessfully challenged as being not specific enough. *American Trucking Associations, Inc. v. U.S. Department of Transportation*, 166 F.3d 374 (D.C. Cir. 1999).[10]

The statute at issue in *MST Express*, 49 U.S.C. § 31144, dealt exclusively with safety fitness determinations.[11] *MST Express*, 108 F.3d at 402. The matter at issue here, however, is a civil penalty determination under 49 C.F.R. Part 386, not a safety fitness

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[9] The Field Administrator notes that the petitioners in *MST Express* were represented by Transland's counsel here. *MST Express*, 108 F.3d at 401.

[10] The Field Administrator notes that the petitioner Truckers United For Safety in *American Trucking Associations, Inc.* was represented by Transland's counsel here. *American Trucking Associations, Inc.*, 166 F.3d at 366.

[11] 49 U.S.C. § 31144 provides, in relevant part that "The Secretary of Transportation shall prescribe regulations establishing a procedure to decide of the safety fitness of owners and operators of commercial motor vehicles...."

determination under 49 C.F.R. Part 385. Unlike *MST Express*, Respondents have not pointed to any statute that would require the FMCSA to prescribe by regulation the documents that it will review in determining whether a motor carrier has complied with the RODS requirements and whether a civil penalty should be levied. FMCSA is under no statutory obligation to promulgate a regulation in such detail; indeed, "the desire to be able to vary these technical elements of the process without excessive delay" is a compelling reason why such standards should not be committed to regulation. *American Trucking Associations, Inc.*, 166 F.3d at 379; *see also Heckler v. Chaney*, 470 U.S. 821, 827, 105 S.Ct. 1649 (1985) (courts are ill-positioned to scrutinize an agency's allocation of its scarce resources).

Transland has misread *MST Express*. It contains no judicial determination that the FMCSA's liability criteria for RODS violations be made any more public than these criteria already are. *MST Express* addressed only the Federal Highway Administration's compliance with 49 U.S.C. § 31144. Furthermore, despite Transland's judicious selection of quotes from *American Trucking Associations*, the court of appeals there also addressed only the FHWA's compliance with 49 U.S.C. § 31144, not whether the agency had complied with FOIA. These opinions cannot be read as requiring the FMCSA to ignore FOIA.

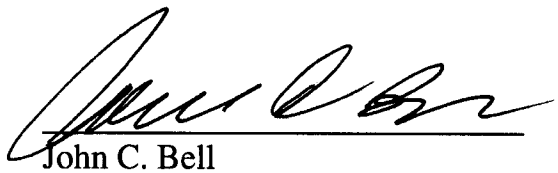
Moreover, Transland again ignores *Aulenback* in making this argument. *Aulenback*, 103 F.3d at 164 n.9. In *Aulenback*, petitioners argued that the precursor to the FOTM was a substantive rule required by FOIA to be published in the Federal Register.

The court explicitly rejected the exact argument made again by Transland here, finding that the precursor to the FOTM was procedural in nature. *Id.*

## VII. Conclusion.

For the foregoing reasons and those as set forth in the Field Administrator's Post-Hearing Brief, the Field Administrator requests that a decision be issued finding that Transland, Inc. is liable for the 118 violations of 49 C.F.R. § 395.8(e) as alleged in the Notice of Claim issued to it, that each driver Respondent is liable for one violation of 49 C.F.R. § 395.8(e) as alleged in the respective Notice of Claim, and ordering Transland, Inc. to pay a civil penalty of $51,920.00.

Respectfully submitted,



John C. Bell
Trial Attorney
Office of Chief Counsel
FMCSA Eastern Service Center
802 Cromwell Park Drive, Suite N
Glen Burnie, Maryland 21061
(443) 703-2249 (Telephone)
(443) 703-2253 (Facsimile)

## CERTIFICATE OF SERVICE

This is to certify that on the 7th day of July 2009, the undersigned mailed or delivered, as specified, the designated number of copies of the foregoing document to:

| | |
|---|---|
| The Honorable Ronnie A. Yoder<br>Chief Administrative Law Judge<br>Office of Hearings, M-20<br>U.S. Department of Transportation<br>1200 New Jersey Avenue, S.E.<br>East Building, Ground Floor<br>Room E12-320<br>Washington DC 20590<br>*Chief Administrative Law Judge* | Two Copies<br>Federal Express |
| Anthony J. McMahon, Esquire<br>5009 Sentinel Drive, No. 57<br>Bethesda MD 20816<br>*Attorney for Respondent Transland, Inc.* | One Copy<br>Federal Express |
| Keith L. Sachs, Esquire<br>Metaxas, Norman & Pidgeon, LLP<br>900 Cummings Center, Suite 207T<br>Beverly MA 01915<br>*Attorney for Respondent Transland, Inc.* | One Copy<br>Federal Express |
| Michael Slaughter<br>20728 Neosho Drive<br>Lebanon MO 65536 | One Copy<br>First Class Mail |
| Brian Willson<br>6051 Highway 17<br>Houston MO 65483 | One Copy<br>First Class Mail |
| Charles Roberts<br>P.O. Box 528<br>Cape Fair MO 65624 | One Copy<br>First Class Mail |
| Christopher Carter<br>5032 South 202nd Road<br>Halfway MO 65663 | One Copy<br>First Class Mail |

James DeJonge
514 Truman Road
Willard MO 65781

One Copy
First Class Mail

Alfonzo Gonzales
4125 Frog Knob Road
Norwood MO 65717

One Copy
First Class Mail

Darin G. Jones
Field Administrator
Federal Motor Carrier Safety Administration
Midwestern Service Center
19900 Governors Drive
Suite 210
Olympia Fields IL 60461

One Copy
Sent via electronic mail

U.S. DOT DOCKETS
Docket Operations, M-30
West Building, Ground Floor
Room W12-140
1200 New Jersey Avenue, S.E.
Washington DC 20590

Original
Filed Electronically in FDMS

Cynthia P. Campise